87-964

NO. 87-

IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1987

JOHN DESOTO,

Petitioner,

v.

YELLOW FREIGHT SYSTEM, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED*

Does Section 301 of the Labor-Management Relations Act pre-empt a state law tort claim for wrongful discharge by an individual who is terminated for his refusal to violate state law and public policy simply because the individual worked in employment covered by a collective bargaining agreement.

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* All parties to the proceeding in the court below are listed in the caption. In the court of appeals, the California Trucking Association was granted leave to file a brief of amicus curiae on behalf of respondent, while Public Citizen Litigation Group and Teamsters for a Democratic Union were granted leave to file a brief of amici curiae on behalf of petitioner.

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John DeSoto respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-17a) is reported at 820 F.2d 1333. The Statement of Uncontroverted

Facts and Conclusions of Law of the district court is unreported (App. C, infra, 20a-31a).

JURISDICTION

The judgment of the court of appeals was originally entered on March 4, 1987, and a judgment and amended opinion were entered on June 30, 1987. A timely petition for rehearing was denied on July 20, 1987 (App. B, infra, 18a-19a). On October 13, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 17, 1987.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor

organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

California Vehicle Code § 630 provides:

A "trailer" is a vehicle designed for carrying persons or property on its own structure and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon any other vehicle. "Trailer" includes a semitrailer when connected to, and having a portion of its weight supported by, an auxiliary dolly, if the auxiliary dolly is of a type

constructed to replace the function of the drawbar and the front axle or axles of a trailer.

California Vehicle Code § 4003 provides, in pertinent part, that:

> A permit, as described in Section 9258, may be issued by the department for operating any of the following vehicles, except a crane:
>
> (a) a vehicle while being moved or operated unladen for one continuous trip from a place within this state to another place either within or without this state or from a place without this state to a place within this state.

California Vehicle Code § 4454 provides:

> (a) Every owner upon receipt of a registration card shall maintain the same or a facsimile copy thereof with the vehicle for which issued.

(b) The provisions of this section do not apply when a registration card is necessarily removed from the vehicle for the purpose of application for renewal or transfer of registration.

(c) Any violation of this section shall be cited in accordance with the provisions of Section 40610.

California Vehicle Code § 4462 provides:

(a) The driver of a motor vehicle shall present the registration or identification card or other evidence of registration of any or all vehicles under his immediate control for examination upon demand of any peace officer.

(b) No person shall display upon a vehicle, nor present to any peace officer, any registration card, identification card, temporary

receipt, license plate, or permit not issued for such vehicle or not otherwise lawfully used thereon under this code.

California Vehicle Code § 40001 provides, in pertinent part, that:

(a) It is unlawful for the owner, or any other person, employing or otherwise directing the driver of any vehicle to cause the operation of the vehicle upon a highway in any manner contrary to law.

(b) It is unlawful for an owner to request, cause, or permit the operation of any vehicle:

(1) Which is not registered or for which any fee has not been paid under this code....

California Vehicle Code § 2600 provides:

The Reciprocity Commission is composed of the Lieutenant Governor, the

Director of Motor Vehicles, the Director of Transportation, the State Controller, and the Commissioner of the California Highway Patrol.

California Vehicle Code § 2602 provides:

> A majority of the members of the commission may act for the commission.

California Vehicle Code § 2650 provides:

> The commission is empowered to enter into formal agreements or arrangements as provided in Article 3 of Chapter 4 of Division 3, commencing at Section 8000.

California Vehicle Code § 8000 provides:

> The Reciprocity Commission may enter into agreements or arrangements with duly authorized representatives of any foreign jurisdiction, provinces, or

country granting exemption to owners of or persons entitled to the possession of or right to operate commercial vehicles which are properly registered or licensed or for which fees have been paid in such jurisdictions, and upon which evidence of registration or payment of fees is conspicuously displayed, from the payment, wholly or partially, of any vehicle license, registration, or weight fees, imposed under this code and Part 5 (commencing with Section 10701) of Division 2 of the Revenue and Taxation Code, or regulatory fees which are, or may be imposed by the Public Utilities Code.

STATEMENT

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), confers jurisdiction on the federal courts over "[s]uits for violation of contracts between

an employer and a labor organization representing employees in an industry affecting commerce...."

A. The Facts

Petitioner John DeSoto began working as a truck driver for respondent Yellow Freight System, Inc. ("Yellow Freight") at its Los Angeles terminal in June of 1978. At all times, his employment was governed by a succession of collective bargaining agreements between Yellow Freight and Local Freight Drivers Union Local Union No. 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 208").

During his almost six years of employment with Yellow Freight, DeSoto occasionally was assigned to deliver a load in a trailer without any current registration papers on it. On those prior occasions, Yellow Freight always gave him a

trip permit to operate these trailers in California.[1]

On March 7, 1984, the dispatcher initially assigned DeSoto to drive a different trailer than Trailer No. 19563. Petitioner discovered no current registration papers on this first trailer and reported the problem to his supervisors. The Pickup and Delivery Supervisor reassigned DeSoto to Trailer No. 19563.

Inspecting this second trailer, DeSoto found that it, too, lacked any current registration papers for operation in the State of California. Instead, the only papers on the trailer were Illinois registration papers with an expiration date of December 31, 1983; a prorate vehicle registration for California which had

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1 Under California Vehicle Code § 4003, a trip permit is issued to allow for the movement of an unregistered vehicle from "without this state to a place within this state."

expired December 31, 1983; and a current highway use permit issued by the State of New York.

DeSoto reported the problems with Trailer No. 19563 to his supervisor. In response, no one at Yellow Freight ever told DeSoto that the trailer was currently registered for operation in California. Brian Sibley, the Branch Manager for the Los Angeles terminal, actually suspected that the order to operate the trailer might entail violations of the law.

Warning about the illegality of his job assignment, DeSoto nonetheless expressed his willingness to deliver a load in Trailer No. 19563 with a trip permit. That day Yellow Freight never offered him one of the available trip permits in the terminal. The Company's sole concession was its issuance of a letter to DeSoto in the event that he was arrested while operating the trailer. The letter stated,

in part, that "any difficulty or violation is the responsibility of Yellow System, Inc., and not the operator of the vehicle."

Sibley threatened to discharge DeSoto if he did not agree to deliver the load in Trailer No. 19563. At one point, DeSoto relented and agreed to the assignment, but, a few minutes later, reconsidered his position and stood by his refusal to drive the trailer, at least without a trip permit. The Branch Manager then discharged DeSoto despite his suspicions about the illegality of the order.

DeSoto filed a timely grievance over his discharge. During the course of the grievance proceedings, Yellow Freight first presented evidence that it had registered trailer no. 19563 in Illinois in November of 1983 and that it had received the registration card for this trailer at its Kansas City headquarters the following

month. In 1983 California and Illinois had entered into the International Registration Plan wherein registration of a vehicle in one state would suffice for registration in the other state as well. This agreement between the two states became effective on January 1, 1984. Nevertheless, § 5 of the International Registration Plan expressly required that the "registration card shall be carried in or upon the vehicle, for which it has been issued, at all times."

In May of 1984, DeSoto appeared before the Joint Western Area Committee, a committee consisting of an equal number of representatives of labor and management. Although DeSoto and his union representatives raised the defense of the illegality of the job assignment, the Joint Western Area Committee voted to sustain his discharge.

B. The Proceedings Below

DeSoto originally filed suit against Yellow Freight in the Los Angeles Superior Court. Petitioner's complaint contained two causes of action. The first cause of action alleged a tort claim for wrongful discharge under California law. The second cause of action alleged violations of 29 U.S.C. § 185.[2] Yellow Freight removed the case to the United States District for the Central District of California.

DeSoto subsequently sought summary adjudication of respondent's liability under the first cause of action, relying entirely upon Yellow Freight's own

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2 With regard to the claim under 29 U.S.C. § 185, DeSoto never accused his union of breaching its statutory duty of fair representation, but instead argued that he had standing, as an individual employee, to challenge an arbitral award contrary to law and public policy. On the standing issue, the district court ruled in DeSoto's favor, but the court of appeal reversed. Petitioner does not raise this issue in this petition for writ of certiorari.

admissions in its answer, answers to interrogatories, responses to requests for admission and deposition testimony. Meanwhile, Yellow Freight sought summary adjudication on the first cause of action, contending that its order to DeSoto was lawful and, in any event, federal law pre-empted this claim under state law.

The District Court found that the order to DeSoto to operate Trailer No. 19563 on March 7, 1984, would have entailed violations of three provisions of the California Vehicle Code (App. C., infra, 27a-28a). California Vehicle Code § 4454(a) provides: "Every owner upon receipt of a registration card shall maintain the same or a facsimile copy thereof with the vehicle for which issued." California Vehicle Code §§ 4462(a), in turn, requires the driver of a motor vehicle to present the registration card under his immediate control upon demand of

any peace officer. California Vehicle Code § 40001 prohibits an owner of a vehicle from directing his or her employees to operate a vehicle in any manner contrary to state law. As the District Court reasoned, the discharge of petitioner for his refusal to follow the unlawful order rendered Yellow Freight liable for the tort of wrongful discharge under California law (id. at 28a-29a).

The District Court further ruled that this claim for wrongful discharge was not preempted by federal law, citing Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) cert. denied 471 U.S. 1099 (1985) (id. at 29a-30a). Pursuant to Fed. R. Civ. P. 54(b), the District Court ordered entry of partial judgment on the first cause of action so as to facilitate Yellow Freight's immediate appeal therefrom.

The court of appeal reversed the partial judgment of the district court (App. A, infra, 17a). At the outset, the court of appeal ruled that the district court had properly exerted pendent jurisdiction over the state claim (id. at 9a-10a). While acknowledging that its own earlier decision in Garibaldi v. Lucky Food Stores, Inc., supra, had ruled that § 301 of the Labor Management Relations Act did not pre-empt a state tort claim for wrongful discharge, the court nonetheless insisted that Garibaldi "must now be read in the light" of Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (id. at 10a-12a). The court below quoted from the passage in Allis-Chalmers that arbitration would lose most of its effectiveness if employees were permitted to "sidestep" the grievance procedure by filing tort claims for breach of good faith obligation (id. at 12a-13a). The court of appeal additionally

cited Pilot Life Ins. Co. v. Dedeaux, 481 U.S. ___, 107 S.Ct. 1549 (1987), and Metropolitan Life Ins. Co v. Taylor, 481 U.S. ___, 107 S.Ct. 1542 (1987), as emphasizing "the pre-emptive force of § 301" (id. at 13a-15a).

Thus, the court of appeal summarized the issue as follows:

> In the present case DeSoto alleges that he was being ordered to disobey state law, and he bases his claim not on the collective bargaining agreement but on the alleged tort. As in Garibaldi, it is possible to say that the tort is distinct from any claim based on the collective bargaining agreement. As in Allis-Chalmers, it is possible to define the tort as independent of the contract and yet conclude that "a central tenet of federal labor contract law under Section 301 will be eviscerated" if the state action is permitted as an end run around the grievance procedure.

Id. at 15a. The court accordingly held that "DeSoto's state claim is pre-empted by Section 301" (id. at 17a).

Despite the holding on the pre-emption issue, there is dictum in the decision

below that Yellow Freight's order to drive the trailer without the requisite registration card was lawful (id. at 16a-17a). Petitioner does not want this Court to be left with a mistaken impression about the merits of his wrongful discharge claim. The dictum in the decision below is wrong in four critical respects.

First, the court ignored the express language of California Vehicle Code §§ 4454(a) and 4462(a). Both of these statutes would have required the registration card on the trailer at the time of its operation by DeSoto.

Second, even if these two statutes somehow do not apply to vehicles registered in accordance with International Registration Plan, California Vehicle Code § 8000 expressly requires that such an interstate agreement will provide "that evidence of registration ... is conspicuously displayed" on the commercial

vehicles. Indeed, § 5 of the International Registration Plan specified that the "registration card shall be carried in or upon the vehicle, for which it has been issued, at all times."

Third, in referring to a so-called 120 day grace period on the display of the registration card, the court of appeal relied entirely upon a letter from Roger E. Hagen, Chief of Registration and Investigative Services for the California Department of Motor Vehicles, to the Chief of the Enforcement Services Division, for the California Highway Patrol.[3] Mr. Hagen obviously had no legal authority to override the provisions of the California Vehicle Code or even the International Registration Plan. See Calif. Veh. Code § 2602. In fact, his letter does not rescind the effective date of the rules

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3 Noticeably, Yellow Freight did not even introduce this letter in the district court.

regarding the display of the registration card, but merely urges the nonenforcement of such rules through May 1, 1984.

Finally, even assuming, arguendo, that the operation of Trailer No. 19563 without the Illinois registration card was perfectly legal, DeSoto refused an order to deliver a load in a trailer which on the day in question neither he nor his superiors had reason to believe was registered in any state. Under these circumstances, Yellow Freight should be estopped from later arguing, as it did, that the vehicle had actually been registered for operation in any state. Bob's Big Boy Family Restaurant v. N.L.R.B., 625 F.2d 850, 854 (9th Cir. 1982). DeSoto's wrongful discharge should have been judged on the facts presented to him by his superiors.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND SEVERAL CIRCUITS, AND RAISES AN IMPORTANT QUESTION OF LAW THAT THIS COURT SHOULD RESOLVE.

1. The lower courts are divided over the issue in this case -- whether Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, pre-empts a state law tort claim by an individual who is terminated for his refusal to violate state law and pubic policy, but whose employment is governed by a collective bargaining agreement. The Seventh and Eighth Circuits, like the court below, have held that the state law claims for wrongful discharge were pre-empted by Section 301. Lingle v. Norge Division of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987) (en banc); Johnson v. Hussman Corp., 805 F.2d 795 (8th Cir. 1986); and Vantine v.

Elkhart Brass Mfg. Co., Inc., 762 F.2d 511 (7th Cir. 1985). The Second, Third and Tenth Circuits, on the other hand, have found no such pre-emption. Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2d Cir. 1987); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120 (3d Cir. 1986); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981). The Ninth Circuit is itself divided on this issue inasmuch as the decision below which found pre-emption cannot be reconciled with the court's earlier decision in Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied 471 U.S. 1099 (1985) (29 U.S.C. § 185 does not pre-empt wrongful discharge claim under California law by a Teamsters Union truck driver who had been terminated for complaining about his employer's illegal delivery of adulterated milk).

The conflict among the circuit courts over the pre-emption of state law claims for wrongful discharge has now come to this Court. On October 13, this Court agreed to review Lingle v. Norge Division of Magic Chef, Inc., supra, No. 87-259. In addition, petitions for writ of certiorari are currently pending in Pratt & Whitney Aircraft Div. v. Baldracchi, supra, No. 87-318, and Willoughby v. Central Illinois Light Co., No. 87-417.

Inasmuch as Lingle has been accepted for review, petitioner respectfully submits that the Court should grant review of this case and either consolidate it for argument with Lingle or hold it in abeyance pending a decision in Lingle. There are, however, three important distinctions between this case and Lingle in their respective analyses of the pre-emption question. These distinctions would yield a fuller

discussion of the issues if the two cases were consolidated for argument.

First, the court in Lingle emphasized the presence of a just cause provision in the collective bargaining agreement. 823 F.2d at 1041-1042. As the Seventh Circuit then reasoned, plaintiff's claim for retaliatory discharge was pre-empted because it depended on an analysis of the terms of the collective bargaining agreement. Id. at 1044-1047. Yet, not all collective bargaining agreements contain provisions requiring just cause or good cause to discharge permanent employees. In the decision below, the Ninth Circuit attributed no significance to the presence of the just cause provision in the collective bargaining agreement. Instead, the court ruled against DeSoto because his employment generally was subject to a collective bargaining agreement. Thus, this case represents a

more sweeping rule on the issue of pre-emption than Lingle.

Another important distinction between the two cases involves their respective analyses of the law on pre-emption. The opinion in Lingle limits itself to a review of the case law regarding the pre-emptive effects of 29 U.S.C. § 185. 823 F.2d at 1042-1051. In contrast, the Ninth Circuit in this case relied heavily upon two of this Court's recent decisions, Pilot Insurance Co. v. Dedeaux, 481 U.S. ___, 107 S.Ct. 1549 (1987), and Metropolitan Life Insurance Co. v. Taylor, 481 U.S. __, 107 S.Ct. 1542 (1987), both of which concerned the pre-emptive effects of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. Hence, the instant case presents an excellent opportunity for this Court to delineate the differences between the pre-emptive effects of ERISA as opposed to Section 301.

A third, significant distinction between Lingle and this case involves the underlying state laws upon which plaintiffs in these cases founded their respective claims for wrongful discharge. Whereas DeSoto was discharged for refusing to violate state vehicle codes, the plaintiff in Lingle was discharged for filing a worker's compensation claim. So far, the courts have ascribed considerable importance to the underlying state statutes in determining whether the wrongful discharge claim is pre-empted. For example, while the majority in Lingle ruled against the plaintiff on his particular claim for wrongful discharge, they nonetheless stated that § 301 does not pre-empt state discrimination laws even though a court in those cases still has to resolve whether good cause existed for the employee's discharge. 823 F.2d at 1046 n. 17. Meanwhile, the dissenters in Lingle

reached the opposite conclusion as to the plaintiff's claim, in part because of the "state's important public policy .... in preserving its worker's compensation system." 823 F.2d at 1053. The Ninth Circuit attempted to distinguish the decision below from its earlier holding in Garibaldi v. Lucky Food Stores, Inc., supra, 726 F.2d 1367, on the basis that "[u]nlike Garibaldi, DeSoto was not fired because of obedience to a state statute designed to protect the health of the citizens of California" (App. A, infra, 16a). By scheduling this case for oral argument together with Lingle, this Court would have a better opportunity to discuss which state laws give rise to wrongful discharge claims that are not pre-empted by Section 301.[4]

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[4] If the Court agreed to hear this case, then petitioner would argue the related issue of how the order to him did violate state law and public policy. If, on the other hand, the Court holds this case

2. Leaving aside the conflict among the courts below, this case should be reviewed because it conflicts with this Court's prior decisions on the pre-emptive effects of Section 301, especially the decisions in Allis-Chalmers Corp v. Lueck, 471 U.S. 202 (1985), and Caterpillar Tractor Co. v. Williams, 481 U.S. ___, 107 S.Ct. 2405 (1987).

In resolving whether federal law pre-empts state law, the "sole task" of the court is "to ascertain the intent of Congress." California Fed. Sav. and Loan Ass'n v. Guerra, 481 U.S. ___, 107 S.Ct. 683, 689 (1987). Congress has never manifested the intention that federal labor law displace all state laws. Motor Coach

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pending a decision in Lingle, then petitioner asks that this case be remanded to the court below to reconsider whether pendent jurisdiction still should be asserted over this state law claim and, if so, then whether the order to DeSoto was lawful under California law.

Employees v. Lockridge, 403 U.S. 274, 288-289 (1971). As this Court concluded years ago:

> "We cannot declare pre-empted all local regulations that touches or concerns in any way the complex interrelationships between employees, employers, and unions, obviously, much of this is left to the States..

Id. at 281.

Unfortunately, Congress has not been explicit about the extent to which § 301 was intended to pre-empt state law. Allis-Chalmers Corp. v. Lueck, supra, 471 U.S. at 208.

> In such instances courts sustain a local regulation "unless it conflicts with federal law or would frustrate the federal scheme or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states."

Id. at 209.

This Court in Allis-Chalmers held that § 301 did pre-empt a tort suit in state court which alleged the bad faith processing of the plaintiff's claim under a

disability plan established pursuant to a collective bargaining agreement. According to the Court, the driving policies behind § 301 require that the meaning and legal consequences of the collective bargaining agreement shall be governed by a uniform federal law regardless of whether the parties style their claims as sounding in tort or contract. Id. at 209-210. See also Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962).

The exact holding in Allis-Chalmers was that:

> [W]hen resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim ... or dismissed as pre-empted by federal labor-contract law.

Id. at 220-221.

This Court nevertheless cautioned that the holding in Allis-Chalmers did not cover all possible claims under state law against an employer by individuals whose employment

are governed by a collective bargaining agreement.

> Section 301 on its face says nothing about the substance of what parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation .... Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Id. at 211-212 (emphasis added).

During the past term, this Court twice has followed Allis-Chalmers in further outlining the parameters of § 301's pre-emptive effects. In Electrical Workers v. Hechler, 481 U.S. ___, 107 S.Ct. 2161 (1987), this Court ruled that a union member could not bring a tort action against her union for failing to provide a safe workplace. Mindful of the "precise limits"

on the holding in Allis-Chalmers, this Court reiterated that § 301 pre-empts state law claims which are "substantially dependent on analysis of a collective bargaining agreement." Electrical Workers, supra, 107 S.Ct. at 2166-2167, fn. 3. The Court in Electrical Workers found that the union member's tort claim did depend upon an analysis of terms of the collective bargaining agreement, because an employer has the duty at common law to maintain a reasonably safe workplace for its employees and because a union can only assume this duty of care by entering into contractual arrangements on the subject with the employer.

More recently, in Caterpillar Inc. v. Williams, 481 U.S. ___, 107 S.Ct. 2425, (1987), this Court unanimously held that claims for breach of contract filed in state court by several former managerial and salaried employees were not removable

to federal court just because these employees had later accepted hourly employment within the collective bargaining unit. This Court chastised the employer in Caterpillar, Inc. for not recognizing that "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement...." Id. at 2431. As the Court later added:

> Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not pre-empted by § 301.

Id. at 2432, fn. 10.

The foregoing decisions of this Court cannot be squared with the decision in this case. DeSoto's tort claim for wrongful discharge asserts that he was terminated for refusing to obey an order that was contrary to the California Vehicle Code and state public policy. Specifically, he alleges that the order to deliver a load in

a trailer without any current registration papers on it would have resulted in violations of California Vehicle Code §§ 4454(a), 4462(a), 40001, as well as § 5 of the International Registration Plan. This claim obviously does not depend on an analysis of any term of the collective bargaining agreement between Yellow Freight and DeSoto's union, Local 208. Under California law, DeSoto can pursue his tort claim against Yellow Freight regardless of whether his employment was governed by collective bargaining agreement or any written agreement at all. See Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 175-176, 164 Cal.Rptr. 839 (1980).

In the decision below, the court tried to downplay DeSoto's claims, by noting that he was not fired because of obedience to a state law designed to protect the health of the citizens. Yet, the cases of this Court have recognized the historic state interest

in "such traditionally local matters as public safety and order and the use of streets and highways." Farmer v. Carpenters, 430 U.S. 290, 299 (1977), quoting from Allen-Bradley v. Wisconsin Emp. Rel. Bd., 315 U.S. 740, 749 (1942).

Ultimately, the court below seems to have been less influenced by the decisions of this Court and more by the worry that claims, like petitioner's claim, will be an "end run around the grievance procedure." These worries are exaggerated. It is (or at least should be) the rare occasion that an employer discharges an employee for refusing to commit an unlawful act.

3. While the decision below may only affect a small number of wrongful discharge claims by employees in collective-bargaining units, it still raises questions of broad public import. The clear message from the court of appeal's opinion is that

employees should obey all orders of their employers, no matter how illegal these orders may be, so long as the employer and the union agree that the employee's disobedience of such orders is just cause for termination. As this court recognized in Allis-Chalmers, 29 U.S.C. § 185 never was intended to grant the parties to a collective bargaining unit the power "to contract for what is illegal under state law." 471 U.S. at 211-212. Nor has this Court previously expressed much confidence in the ability of the grievance and arbitration process to vindicate employee's legal rights, as opposed to their contractual rights. See Barrentine v. Arkansas-Best Freight Systems, 450 U.S. 728 (1984); Alexander v. Gardner-Denver Co., 415 U.S. 361 (1974).

This decision below also creates a troublesome division between organized and unorganized employees. In states, such as

California, which allow employee's claims for wrongful discharge, the decision below does not affect the legal rights of the unorganized. However, in these same states, the decision below deprives organized employees of these similar legal rights. They no longer can pursue claims for wrongful discharge solely because their employment is governed by a collective bargaining agreement. Hence, the organized employees have literally become second class citizens in these states.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the case should either be consolidated for argument with Lingle v. Norge Division of Magic Chef, Inc., No. 87-259, or held in abeyance pending a decision in Lingle. In the event that this case is not argued before this Court but the decision in Lingle is reversed, then

petitioner further submits that this case should be remanded to the court below with instructions that it reconsider whether pendent jurisdiction still should be exercised over this case and, if so, whether petitioner does state a claim for wrongful discharge under California law.

Respectfully submitted,

Robert D. Newman

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Dated: November 17, 1987.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6608; 86-5800
D.C. No. CV 84-8378-CBM

JOHN DESOTO,
Plaintiff/Appellee,

v.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant/Appellant.

Argued and Submitted
November 5, 1986--Pasadena, California

[Filed March 4, 1987]
[Amended June 30, 1987]

Before Arthur L. Alarcon, Melvin Brunetti and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

Appeal from the United States District Court
for the Central District of California

Consuelo B. Marshall, District Judge, Presiding

ORDER

The slip opinion p. 6 is amended by adding the following beginning as a new paragraph, just before [3]:

Since the argument of the present case, the preemptive force of § 301 of Labor Management Relations Act has been emphasized by the Supreme Court. Pilot Life Insurance Co. v. Dedeaux, ___ U.S. ___ (1987); Metropolitan Life Insurance Co. v. Taylor, ___ U.S. ___ (1987). In the course of holding that ERISA pre-empted state common law tort actions for fraud, the court took notice of the language of Congress preempting such actions:

> All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947. H.R. Conf.

> Rep. No. 93-1280, p. 327 (1974), quoted in Pilot Life at 13.

The Court went on to say:

> Congress was well aware that the powerful preemptive force of § 301 of LMRA displaced all state actions for violation of contracts between an employer and a labor organization, even when the state action purported to authorize a remedy unavailable under the federal provision.

Analogously in Metropolitan Life the Court found a state claim for wrongful termination of employment to be preempted by ERISA. On its face, the complaint was simply for violation of state law, but the court found that the federal statute's "extraordinary preemptive power, such as has been found with respect to § 301 of the LMRA" converted an ordinary state common law complaint into a federal claim. Metropolitan Life at ___. Pan American Airways v. Puchert, 472 U.S. 1001 (1985) is not to the contrary; Puchert claimed to have been discharged in contravention of a specific state statute prohibiting

discharge; the area protected by the statute was not covered by the LMRA. Puchert like Garibaldi was a special exception to the preemptive power of the LMRA.

OPINION

NOONAN, Circuit Judge:

John DeSoto, a resident of California, brought an action against Yellow Freight Systems, Inc. (Yellow Freight), an Indiana corporation, and assorted unknown Does alleging that the had been wrongfully discharged because he refused to commit a violation of law. He also sued Yellow Freight under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 appealing a decision of the grievance committee which sustained his discharge.

The action was brought in a superior court of the State of California. On

motion of Yellow Freight it was removed to the federal court. The district court granted summary judgment for DeSoto on both counts. We reverse and enter judgment for the defendant.

Events. John DeSoto, age 33, has been working for Yellow Freight for almost six years. He was employed as a heavy duty pickup and delivery driver at the Washington Boulevard terminal of Yellow Freight in Los Angeles. He was one of three trustees of Local 208 of the Teamsters Union and one of five union stewards at the Los Angeles terminal.

On March 7, 1984 he returned to work after having been on leave to bury his mother. He was assigned a trailer which he thought was not properly registered and which had a defective door. He informed the dispatcher and was given another trailer, No. 19563. He found it to contain Illinois registration papers with an

expiration date of December 31, 1983 and a prorated vehicle tag for California which had expired on the same date. He objected that it would be illegal to drive without further documentation. He was given a letter from the company stating that the California prorated sticker for 1984 had been lost and that Yellow Freight accepted any responsibility for lack of registration. DeSoto still refused to drive the trailer

Brian Sibley, the branch manager of Yellow Freight, then gave DeSoto a warning letter that he would be fired if he did not obey the order to drive. After about one-half hour of indecision, DeSoto agreed to drive No. 19563, but he then got the impression that others in the office were laughing at him and he changed his mind and refused to take out the trailer. Sibley discharged DeSoto.

In May 1984 the union presented DeSoto's grievance before the Joint Western Area Committee consisting of an equal number of representatives of management and labor. The Committee without opinion, sustained his discharge. DeSoto then brought his case in the state court.

Issues: Did DeSoto state a good federal cause of action? Was the pendent state claim properly heard?

Analysis: Under the collective bargaining agreement between Yellow Freight and the Teamsters (Western State Area Pickup and Delivery Local Cartage and Dock Workers Supplemental Agreement Covering Drivers Employed by Private, Common and Contract Carriers, 1982-1985), an employer may not discharge an employee "without just cause and without giving a warning notice in writing." A grievance procedure sets

out that any dispute shall first be taken up between the employer and the local union involved. If they fail to agree, the dispute is to be filed with the Joint State Committee. If this committee is unable to agree, the case at the request of the union or the employer is to be filed with the Joint Western Area Committee. A majority vote of this Committee is "final and binding upon the parties to the dispute and the employee(s) involved."

The Supreme Court has determined that an employee may not sue the employer under Section 301 of the Labor Management Relations Act where a grievance procedure has been followed and the decision has been against him unless the employee can show that the union failed to represent him in the proceeding. An employee seeking to bring suit in the federal courts has "the burden of demonstrating breach of duty by the Union." Hines v. Anchor Motor Freight,

Inc., 424 U.S. 554, 570 (1976). Even if the charges against him were false and he was fired without cause, an employee in this position cannot expect the grievance procedure "to be error free." Id. at 571. If the union has fairly represented him in the grievance process, an employee must as a matter of law lose in an attack upon the arbitration decision. In this case, where DeSoto was an officer of the local, there is not the slightest suggestion that the union failed to prosecute his grievance or that the union acted in bad faith. DeSoto had a hearing before the ultimate grievance committee, and he lost. His federal case is meritless.

The question remains whether the district court should have retained jurisdiction of the pendent state claim. Such jurisdiction is discretionary, its justification lying "in considerations of judicial economy, convenience and fairness

to litigants." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Where the state claim is closely tied to questions of federal policy, the argument for the exercise of pendent jurisdiction "is particularly strong," especially so where "the allowable scope of the state claim implicates the federal doctrine of preemption." Id. at 727. The present case is one where the state claim does implicate the federal doctrine of preemption. Exercise of federal discretion over the state claim was appropriate.

In Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied 471 U.S. 1099 (1985), 105 S.Ct. 2319, 85 L.Ed.2d 839, our court in a case of first impression ruled that the Labor Management Relations Act did not preempt a state tort claim for wrongful discharge. In that case the plaintiff alleged that he had been wrongfully discharged because of

reporting to health officials a shipment of adulterated milk after his supervisors had ordered him to deliver it. The court found that his whistle blowing "to protect the health and safety of the citizens of California" was "exactly the type of conduct" that the California Supreme Court intended to protect in recognizing a tort action for discharge because of obedience to a state statute. Id. at 1374. Our court said more generally that "a claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process.... It furthers the state's interest in protecting the general public -- an interest which transcends the employment relationship." Id. at 1375. Our court found support for its result in Machinists Automotive Trades District Lodge No. 190 v. Utility Trailer Sales, 141 Cal.App.3d 80, 190 Cal.Rptr 98,

appeal dismissed for want of a substantial federal question, 464 U.S. 1005, 104 S.Ct. 520, 78 L.Ed.2d 785 (1983).

Machinists and Garibaldi must be now read in the light of Allis-Chalmers Corp. v. Lueck, 105 S.Ct. 1904 (1985), holding that a state tort claim was precluded by § 301 of the Labor Management Relations Act. The Court observed, "Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if Section 301 is not understood to permit such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge -- in short, the whole range of disputes traditionally resolved through arbitration could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an

individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness." Id. at 1915-1916.

Since the argument of the present case, the preemptive force of § 301 of Labor Management Relations Act has been emphasized by the Supreme Court. Pilot Life Insurance Co. v. Dedeaux, ___ U.S. ___(1987); Metropolitan Life Insurance Co. v. Taylor. ___ U.S. ___ (1987). In the course of holding that ERISA pre-empted state common law tort actions for fraud, the court took notice of the language of Congress pre-empting such actions:

> All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under

> section 301 of the Labor-Management Relations Act of 1947. H.R. Conf. Rep No. 93-1280, p. 327 (1974), quoted in Pilot Life at 13.

The Court went on to say:

> Congress was well aware that the powerful preemptive force of § 301 of LMRA displaced all state actions for violation of contracts between an employer and a labor organization, even when the state action purported to authorize a remedy unavailable under the federal provision.

Analogously in Metropolitan Life the Court found a state claim for wrongful termination of employment to be preempted by ERISA. On its face, the complaint was simply for violation of state law, but the court found that the federal statute's "extraordinary preemptive power, such as has been found with respect to § 301 of the LMRA" converted an ordinary state common law complaint into a federal claim. Metropolitan Life at ___. Pan American Airways v. Puchert, 472 U.S. 1001 (1985) is not to the contrary: Puchert claimed to have been discharged in contravention of a

specific state statute prohibiting discharge, the area protected by the statute was not covered by the LMRA. Puchert like Garibaldi was a special exception to the preemptive power of the LMRA.

In the present case DeSoto alleges that he was being ordered to disobey state law, and he bases his claim not on the collective bargaining agreement but on the alleged tort. As in Garibaldi, it is possible to say that the tort is distinct from any claim based on the collective bargaining agreement. As in Allis-Chalmers, it is possible to define the tort as independent of the contract and yet conclude that "a central tenet of federal labor contract law under Section 301 will be eviscerated" if the state action is permitted as an end run around the grievance procedure. Id. at 1916.

Unlike Garibaldi, DeSoto was not fired because of obedience to a state statute designed to protect the health of the citizens of California. He was fired because he had in good faith believed that it was illegal for him to drive the trailer without the requisite permits in the truck. In fact, he was mistaken in his belief. Under an agreement between the state of Ilinois and the state of California, there was a grace period which extended until May 1984, during which the California prorate sticker did not have to be displayed in the truck. Directive, California Department of Motor Vehicles, Jan. 4, 1984, R. Hagan, Chief, Registration & Investigative Services (120 day grace period before Illinois commercial vehicles are required to display indicia of registration). Unquestionably, DeSoto thought he was doing the right thing in refusing to take the trailer out. Unfortunately for him, he was

mistaken. He was not acting in defense of a public policy of the State of California, but incorrectly asserting his own interpretation of the law. It is just this kind of dispute over what is the appropriate management response to difficult behavior by an employee that should be the subject of a grievance procedure. It is not the kind of case that should become either a federal case or a state tort action. Harmonious relations between management and labor depend on the grievance procedure being final in this kind of dispute. DeSoto's state claim is preempted by Section 301 and fails as his Section 301 claim fails.

REVERSED. Judgment for the Defendant.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 85-6608, 86-5800
D.C. No. CV 84-8378-CBM

JOHN DESOTO,
Plaintiff/Appellee,

v.

YELLOW FREIGHT SYSTEMS, INC.
Defendant/Appellant.

ORDER

[Filed July 20, 1987]

Before: ALARCON, BRUNETTI, and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no

judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 84-8378-CBM

JOHN DESOTO,
Plaintiff,

v.

YELLOW FREIGHT SYSTEM, INC.,
a foreign corporation, et al.,
defendants.

[Filed October 23, 1985]

STATEMENT OF UNCONTROVERTED FACTS
AND CONCLUSONS OF LAW

On August 12, 1985, the Court heard Plaintiff's and Defendants' Cross-Motions for Summary Judgment. Having duly considered the motions, including all written materials submitted in support of and in opposition to the motions, and oral

argument, the Court now issues the following Uncontroverted Facts and Conclusions of Law:

STATEMENT OF UNCONTROVERTED FACTS

1. This action was originally filed in the Superior Court of the State of California in the County of Los Angeles on or about August 6, 1984. This action was removed to this court on or about October 30, 1984.

2. the first cause of action in plaintiff's Complaint alleges a tort claim under California state law for wrongful discharge. The second cause of action in plaintiff's Complaint alleges a cause of action under 29 U.S.C. § 185(a).

3. At all times material herein, Defendant Yellow Freight System, Inc. (hereinafter Yellow Freight) was, and is now, a corporation duly recognized under the laws of the State of Indiana, and is an employer in an industry affecting commerce,

as defined in 29 U.S.C. §§ 152(2), 142(1) and (1), and within the meaning of 29 U.S.C. § 185.

4. At all times material herein, Local Freight Drivers Union, Local No. 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter Local 208), was, and is now, a labor organization representing employees in an industry affecting commerce, as defined in 29 U.S.C. § 152(5), 142(1) and (3), and within the meaning of 29 U.S.C. § 185.

5. On or about June 23, 1978, plaintiff John DeSoto began working as a truck driver for defendant Yellow Freight at its terminal located in the County of Los Angeles, State of California. Plaintiff worked continuously for defendant Yellow Freight up until his termination on March 7, 1984, as described hereinbelow.

6. On or about April 1, 1982 defendant Yellow Freight and Local 208 executed a three-year collective bargaining agreement, covering certain classifications of employees of defendant Yellow Freight, including the plaintiff John DeSoto. At all times between June 23, 1978 and March 7, 1984, plaintiff John DeSoto was employed by Yellow Freight as a local pickup and delivery driver at the Los Angeles Terminal and as such was covered under the Teamster Contract.

7. The following sequence of events transpired on March 7, 1984:

a. That morning, plaintiff was assigned by his superiors at defendant Yellow Freight to deliver a load in trailer no. 19563. At that time, the only papers on trailer no. 19563 were Illinois registration papers with an expiration date of December 31, 1983; a prorated vehicle registration for California which had

expired December 31, 1983; and a current highway use permit issued by the State of New York. There were no papers on this trailer, indicating that it had been registered for operation in the State of California or any other state for calendar year 1984.

b. Plaintiff expressed the concern to his superiors at defendant Yellow Freight, in particular, the Branch Manager Brian Sibley, that operation of trailer no. 19563 would violate California Vehicle Code absent the issuance of a trip permit.

c. That day neither Sibley or any other representative of defendant Yellow Freight gave a trip permit to the plaintiff.

d. Sibley threatened plaintiff with termination of his employment if he did not deliver a load in trailer no. 19563.

e. After plaintiff's first refusal to operate trailer no. 19563, Yellow

Freight supplied plaintiff with a written letter in which Brian Sibley stated that the California Pro Rate sticker had been lost for trailer no. 19563. The letter also states that any difficulty or violation is the responsibility of Yellow Freight Systems, Inc. and not the operator of the vehicle. Plaintiff still refused to operate trailer no. 19563.

f. Sibley discharged the plaintiff for his refusal to deliver a load in trailer no. 19563.

8. Sibley was acting in the course and scope of his employment with defendant Yellow Freight when he discharged the plaintiff on March 7, 1984, for his refusal to deliver a load in trailer no. 19563.

9. In accordance with the grievance procedures contained in the above-mentioned collective bargaining agreement, plaintiff grieved in a timely fashion the termination

of his employment by defendant Yellow Freight.

10. On or about May 16, 1984, a hearing was held on plaintiff's grievance before the Joint Western Area Committee, which committee consisted of an equal number of delegates from employers and local unions who are signatories to the above-mentioned collective bargaining agreement. At this hearing, plaintiff testified to how the operation of trailer no. 19563 on March 7, 1984, would have been a violation of California law. That same day, this Joint Western Area Committee rendered its award, sustaining the discharge of plaintiff John DeSoto by defendant Yellow Freight.

11. Since May 16, 1984, defendant Yellow Freight has not employed the plaintiff in any capacity.

12. Each and every Conclusion of Law which may properly be an Uncontroverted

Fact is incorporated herein as though fully set forth.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the second cause of action in plaintiff's complaint pursuant to 29 U.S.C. § 185. The Court has pendent jurisdiction over the first cause of action in plaintiff's complaint.

2. The operation by plaintiff of trailer no. 19563 on March 7, 1984, would have violated California Code §§ 4454(a), 4462(a) and 40,001.

Vehicle Code § 4454(a) provides:

> Every owner upon receipt of a registration card shall maintain the same or a facsimile copy thereof with the vehicle for which issued.

Vehicle Code § 4462(a) provides:

> The driver of a motor vehicle shall present the registration or identification and or other evidence

of registration of any or all vehicles under his immediate control for examination upon demand of any peace officer.

Vehicle Code § 40,001 provides:

It is unlawful for the owner, or any other person, employing or otherwise directing the driver of any vehicle to cause the operation of the vehicle upon the highway in any manner contrary to law.

3. Terminating plaintiff for his refusal to operate trailer no. 19563 on March 7, 1984, defendant Yellow Freight is liable for the tort of wrongful discharge. It is a violation of fundamental public policy for defendant to terminate plaintiff for his refusal to deliver a load in a trailer which contains no valid registration papers. See Tameny v. Atlantic Richfield, Co., 27 Cal. 3d 167, 164 Cal.Rptr. 839 (1980); Petermann v.

I'nt'l B'hd. of Teamsters, 173 Cal.App. 184, 344 P.2d 25 (1959).

4. It is irrelevant whether plaintiff's stated reason for his refusal to operate trailer no. 19563 was merely a pretext to enhance his bargaining position as a union steward in labor disputes with management.

5. The Joint Western Area Committee's decision to uphold the termination of plaintiff by defendant Yellow Freight is unenforceable as being contrary to law and public policy. See Broadway Cab Cooperative, Inc. v. Teamsters & Chauffeurs Local Union No. 281, IBT, 710 F.2d 1379 (9th Cir. 1983); General Teamster, Chauffeurs, Warehousemen, etc. v. Consolidated Freightways, 464 F.Supp. 346 (W.D. Pa. 1979).

6. Plaintiff's wrongful discharge claim is not preempted by federal labor law. A claim grounded in state law for

wrongful termination for public policy reasons poses no significant threat to the collective bargaining process. See Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984).

7. There are no genuine issues as to any material fact on the liability of defendant Yellow Freight under either plaintiff's first or second cause of action in this complaint.

8. There is a material factual issue in dispute as to whether defendants acted with malice, oppression, or fraud as required under California Civil Code § 3294. Thus, defendants' motion for summary judgment as to plaintiff's request for punitive damages is denied.

9. Furthermore, plaintiff is not alleging an emotional distress cause of action; rather, plaintiff is seeking damages for pain and suffering as part of his compensatory damages. Thus,

defendants' request for summary judgment as to plaintiff's "emotional distress" claim is denied.

10. Each and every Uncontroverted Fact which may be properly be a Conclusion of Law is incorporated herein by reference as though fully set forth.

Dated: October 21, 1985.

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL, Judge
United States District
Court

Supreme Court, U.S.
FILED
DEC 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DESOTO,
Petitioner,
vs.

YELLOW FREIGHT SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 87-964

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN DESOTO,

Petitioner,

v.

YELLOW FREIGHT SYSTEM, INC.

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT AS TO RULES 34.1 and 28.1

Respondent has no objection to the Petition in respect to Rules 34.1 (b)(d) and (e). As to Rules 34.1 (a) and (f) and Rule 28.1 Respondent states as follows:

Rule 34.1 (a): Respondent objects to Petitioner's statement of the

"Question Presented" on the grounds that neither the question therein posed or any subsidiary question included therein is in fact posed by the decision and judgment of the Court of Appeals or by the record made in the action.

Rule 34.1(f): The statement of statutes involved should include:

28 U.S.C §1445(c) which reads as follows:

"A civil action in any state court arising under the workmen's compensation laws of such state may not be removed to any district court of the United States".

California Vehicle Code §8010(a). See Appendix A for text.

Rule 28.1: The names of the parent company of Respondent Yellow Freight System, Inc. [Yellow Freight] its subsidiaries (except wholly owned subsidi-

iaries) and all of its affiliates are set forth in the margin. 1/

STATEMENT OF THE CASE

At all stages in this controversy the underlying question has been whether petitioner John DeSoto ["DeSoto"] would have violated any law if he had done the work assigned to him on March 7, 1984 as ordered. DeSoto's statement of the case is unsatisfactory because it is not an accurate statement of the true nature of that dispute.

A. The Facts

On March 7, 1984 DeSoto was employed by Yellow Freight an interstate common carrier of property by motor vehicle, as

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1. Yellow Freight System, Inc. of Delaware; Northcutt Inc.; Delcan, Inc.; 266963 B. C., Ltd.; Northcutt Trailer Sales, Inc.; Northcutt Truck Center, Inc.; Ontario Enterprises, Inc.; Yellow Freight System of British Columbia, Inc.; Yellow Freight Ontario, Inc.

as a pick-up and delivery driver at a company terminal in Los Angeles, CA. DeSoto's job assignment on that day was to deliver two shipments then loaded in Yellow Freight's trialer No. 19563 ["Trailer 19563"]. DeSoto refused to comply with that order because Trailer 19563 did not carry the evidence of its registration in California for 1984 which DeSoto considered was necessary to make it lawful for him to operate the trailer. Before any disciplinary action was taken Brian Sibley, the terminal manager, sought and secured advice of an attorney that Desoto would not violate the law if he operated Trailer 19563 without a current registration card.

Trailer 19563 was in fact then duly registered for operation in California as a foreign commercial vehicle for the entire year 1984 under the terms of a

reciprocity agreement between the states of California and Illinois which became effective on January 1, 1984. ["IRP Agreement"]. The statutory authority for that agreement was California Vehicle Code §8010(a). The registration card required by the IRP Agreement had been issued but was not with the vehicle on March 7, 1984

DeSoto was an employee under covered a collective bargaining agreement between Yellow Freight and the Teamsters. The here most pertinent portions of that agreement are correctly summarized in the opinion of the Court of Appeals, (Petition, Appendix A, pp. 7a-8a, 820 F. 2d 1434, at 1436). The opinion of the Court of Appeals also summarizes correctly the disciplinary action taken on March 7, 1984 pursuant to that agreement, (Petition Appendix

A, pp. 5a-7a, 820 F.2d at, 1435-1436).

At the time of the events the issue in dispute was whether DeSoto would be violating any law if he drove Trailer 19563 when it did not have with it a card evidencing its current registration in California.

At DeSoto's request his union grieved his discharge through those procedures. After a hearing, a transcript which is of record in this case, the Joint Western Area Committee upheld the discharge. On the evidence presented at the hearing the issue before the arbitrators was whether DeSoto would have violated any law if he had driven Trailer 19563, a duly registered vehicle, when it did not have with it a card evidencing such registration. DeSoto concedes he was fairly represented by his union at all stages of

his discharge dispute.

B. The Proceedings Below.

In his complaint, filed originally in California Court, DeSoto made both a federal law claim under Section 301 of the Labor Management Relations Act ["LMRA §301"] 29 U.S.C. §185 to set aside the arbitration award sustaining his discharge, and a state law tort claim on authority of Tameny v. Atlantic Richfield Co. 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) in which he sought both actual and punitive damages for wrongful discharge. Both claims are based on the same operative facts.

On Yellow Freight's motion the case was removed to the federal court. DeSoto has never moved for remand of the state law claim to the state court. The case was resolved in the District

Court on cross-motions were judgment. Those cross-motions were resolved in DeSoto's favor by the District Court by the "Partial Judgment", a copy of which is Appendix C of the Petition.

The Court of Appeals on a de novo review of the Partial Judgment reversed and granted judgment on both claims for Yellow Freight. DeSoto's petition for rehearing and request for hearing en banc were denied.

At all stages in the litigation it has been DeSoto's position that his claim of wrongful discharge can be prosecuted both as a federal claim under [LMRA § 301] and as a state law tort claim in the same action and that federal courts have jurisdiction to hear and resolve both claims.

By decision and judgment the Court

of Appeals has held that DeSoto would not have violated any law if he had operated the trailer without the requisite permits, (Petition, Appendix pp.16-17a, 820 S. 2d at 1438). DeSoto accepts that holding as valid as it pertains to the grievance and his federal law claim under LMRA §301 (Petition, p.14 n.2).

DeSoto's statement of the "Question Presented" and his agruments for grant of a writ of certiorari are all based on the premise that he was "terminated for his refusal to violate state law in public policy". That premise is in direct conflict with the evaluation of the facts and California law made by the Court of Appeals in its decision, (Petition Appendix A, pp. 16a-17a, 820 F.2d at 1438).

SUMMARY OF THE ARGUMENT

DeSoto's petition is founded on the invalid premise that he was discharged for his refusal to violate state law and public policy. He was in fact discharged because he refused to perform a lawful work order on the mistaken belief that it required him to violate the law and the Court of Appeals has so held. Because the "Question Presented" by Petitioner is based on a premise contrary to the record made in the Court below Petitioner is asking this Court to rule on an abstract proposition of the law.

The decision of the Court of Appeals to take pendant jurisdiction of the state law claim was proper under United Mine Workers v. Gibbs, 383 U.S. 715, 6, L.Ed. 2d 218, S.Ct. 1130, (1966) even without consideration of the pre-

emptive effect of LMRA §301. By its holding that DeSoto was mistaken in his belief that his work order required him to do an unlawful act the Court of Appeals has in fact resolved the state law claim on its merits under applicable state law. There is a valid basis for the judgment on the state law claim without considering the holding on the pre-emption issue.

The only issue in dispute at the time of the events and thereafter was whether DeSoto would violate the law if he drove his trailer without its registration card in place. That issue was resolved against him by an arbitration award after a fair hearing. The Court of Appeals has affirmed the award. DeSoto accepts that decision. Under federal labor law DeSoto was discharged for good cause and that discharge is

final and binding.

The Court of Appeals has interpreted and applied correctly the standards established by this Court in Allis-Chalmers v. Lueck, 471 U.S. 202 85 L.Ed. 2d 206, 105 S.Ct. 1904 (1985) on the issue of pre-emption under LMRA §301 because: (1) the sole liability issue under both the bargaining agreement and the state law claim is whether DeSoto was discharged for "good cause"; (2) in this case the only legal right potentially invaded under both claims is the "good cause" contract right; (3) pre-emption is the only way to preserve the central role of arbitration required by federal labor law.

The cases relied upon by DeSoto to establish a conflict in the Circuits do not do so because: (1) the link between the state court claim and the labor con-

tract must be determined on a case by case basis; (2) in the cited cases the employee had both a "good cause" contract right and an independent state law right and the conflict arose because the Courts of Appeal had differing views as to whether, for pre-emption purposes, the wrong charged should be treated as an invasion of the contract right or an invasion of an independent state law right; (3) in this case there could be no liability under the state law claim unless there was also on the same facts a good cause liability under the contract; (4) the pre-emption issue here is whether, on the same facts and in the same case, LMRA §301 allows DeSoto to be rightfully discharged under federal law and wrongfully discharged under state law.

ARGUMENT

I

DESOTO ASKS THIS COURT TO RULE ON AN ABSTRACT PROPOSITION OF LAW.

The "Question Presented" in the petition presumes that DeSoto was discharged for "his refusal to violate state law and public policy" (Petition, p.i). There is no basis for that presumption in this case.

In its decision the Court of Appeals concluded that DeSoto-

> "...was fired because he had in good faith believed that it was illegal for him to drive the trailer without the requisite permits in the truck. In fact he was mistaken in that belief... He was not acting in defense of a public policy of the state of California, but incorrectly asserting his own interpretation of the law" (Petition, Appendix A. pp.16a-17a, 820 F.2d at 1438).

DeSoto petitioned for rehearing and requested hearing en banc on the ground,

among others, that those findings and conclusions of the Court of Appeals were erroneous. His petition and request were denied (Petition, Appendix B, pp.18a-19a).

The above quoted findings and conclusions of the Court of Appeals are in direct conflict with DeSoto's assertion in the "Question Presented" that he was terminated for his refusal to violate state law and public policy. Those findings and conclusions are an integral part of the decision and judgment which DeSoto now asks this Court to review.

There is no possible way the decision and judgment of the Court of Appeals could be construed as a holding that DeSoto was discharged for his refusal to violate state law and public policy. DeSoto's proposal that this Court should assume for purposes of this

petition that DeSoto's concept of a California law is correct does not supply that deficiency.

Because he asks this Court to presume that he was discharged for his refusal to violate the law and public policy when the Court below held he did not so, DeSoto is requesting this Court to adjudicate a hypothetical question of law. The petition should be denied on that ground.

II

THERE IS NO BASIS ON THE MERITS FOR THE REVIEW SOUGHT.

A

PETITIONER MISTATES THE TRUE NATURE AND PRESENT STATUS

DeSoto seeks review of the holding of the Court of Appeals that his state claim is pre-empted by LMRA § 301. His argument is that a writ of certiorari is

proper under both Rule 17(a) and Rule 17 (c). The argument is faulted on both counts because DeSoto has not stated correctly the true nature and status of the case.

Throughout this litigation it has been DeSoto's contention that his discharge involved a fact situation comparable to that presented in Tameny v. Atlantic Richfield Co. 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330 (1980) and Garibaldi v. Lucky Food Stores, Inc. 726 F.2d 1367 (1984) cert. denied 471 U. S. 1099, 105 S.Ct. 2319, 85 L.Ed. 2d 839 (1985). It does not.

Tameny and Garibaldi both involved situations in which the Courts and the parties were required to take the facts alleged in the complaint as true. On that basis it was accepted as a fact that the challenged order required the

employee to commit a criminal act and that the employer was aware that the employee would be committing a criminal act if he complied with the order.

Unlike the situation in Tameny and Garibaldi the facts alleged by DeSoto in his complaint are not controlling here. By its decision and judgment in this case the Court of Appeals has concluded after a de novo review of the entire record that DeSoto's work order did not require him to violate the law. Those findings and conclusions cannot be ignored for the purpose of defining the fact situation with which the Court of Appeals was dealing in its consideration of the pre-emption issue. At the very least, they demonstrate that the question in issue on the discharge was whether the work order did or did not

violate the law. There was never an issue as to whether DeSoto could be required to violate the law.

The terms of the bargaining agreement are also of vital importance for a proper delineation of the pre-emption issue. The provision of the collective bargaining agreement here most directly involved is Article 46, the pertinent portions of which are reproduced as Appendix B. As therein stated, a permanent employee may not be discharged "without just cause". For present purposes the procedures to accomplish a discharge are important.

Under the terms of Article 46 DeSoto had the right to request an investigation as to his discharge and to "be reinstated" should such and investigation prove "an injustice" had been done. The grievance precedures provided

for elsewhere in the bargaining agreement was that "investigation". Its final step was an arbitration award of the Joint Western Area Committee. ["Area Committee"]

The Area Committee was authorized to resolve "any controversy which might arise". By Article 46 that Committee was granted authority to accept or reject any or all arguments pertaining to the issue in each case.

DeSoto requested an investigation of his termination. His objection was grieved by his union on his behalf. He concedes he was fairly represented by his union at all times. By the terms of Article 46 Yellow Freight had authority to require DeSoto to work during the pendency of his grievance proceeding (Appendix B, Art. 46, Sec. 2(c)). Under that authority DeSoto was working at the

time his discharge was upheld on grievance. DeSoto status as an employee did not end until that award was made.

B.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT

By its decision and judgment the Court of Appeals resolved DeSoto's federal law claim under LMRA §301 to set aside the grievance award. Its decision on that aspect of the litigation follows and applies the federal law governing judicial review of arbitration awards most recently restated by this Court in United Paperworkers International Union v. Misco, Inc., Supreme Court Case No. 86-651, decided December 1, 1987. The necessary effect of the decision and judgment on the LMRA §301 claim is that

under federal labor law the grievance award sustaining DeSoto's discharge is final and binding. DeSoto does not challenge that determination.

As the Court of Appeals stated, the remaining issue before it for decision was whether the pendent state claim was properly heard. The Court of Appeals concluded it did have such authority under the standards fixed by this Court in United Mine Workers v. Gibbs, 383 U. S. 715, 16 L.Ed 2d. 218 (1966) 86 S.Ct. 1130. Unless he does so now, DeSoto has never objected to the adjudication of his state law claim by the federal courts. The basic issue in dispute - whether his work order required DeSoto to violate the law - is common to both claims. The Courts of Appeals has adjudicated the LMRA §301 claim by a judgment on the merits and thereby re-

tains jurisdiction over the federal law claim. Clearly, the requirements stated in Gibbs for exercise of pendent jurisdiction are met.

In its resolution of the state law claim the Court of Appeals has done two things:(1) It has held the state law claim is pre-empted by §301; and (2) It has held that DeSoto's work order did not require him to violate state law. Thus, even if the pre-emption holding were ignored, the judgment in the state law claim would still be proper because DeSoto has failed to prove a claim under the rule of State tort law established in Tameny v. Richfield Oil, Co., 27 Cal. 3d 167, Supra.

It is now clearly established that it was the intent of Congress that principles of federal law established under LMRA §301 must be paramount in the area

covered by that statute and that the pre-emptive force of LMRA §301 is broad. Allis-Chalmers Corporation v. Lueck, 471 U.S. 202, Supra. Metropolitan Life Insurance Co. v. Taylor 481 U.S. ___, 95 L.Ed 2d 55, 107 S.Ct. 1549 (1987); Pilot Life Insurance Co. v. Dedeaux, 481 U.S. ___, 95 L.Ed. 2d 39, 107 S.Ct. 1542 (1987) Electrical Workers v. Hechler, 481 U.S. ___, 95 L.Ed. 2d. 791, 107 S.Ct. 2161 (1987). The basic issue is whether the state law claim would frustrate the federal labor law contractual scheme established in LMRA §301. In Allis-Chalmers v. Lueck, this Court spelled out the standards to be used for determining when a state law tort claim must be deemed pre-empted by LMRA §301. The Court of Appeals cited that case and applied its standards here.

In Allis-Chalmers v. Lueck, 471

U.S. at 219 this Court stated:

> "A final reason for holding that Congress intended §301 to pre-empt this kind of derivative tort claim is that only that result preserves the central role of arbitration In our 'system of industrial self-government'".

That requirement fits this case exactly. DeSoto'a claim is that he was discharged without just cause both under LMRA §301 and state law. The basic issue in both claims is the same. The ground for termination charged by Yellow Freight was DeSoto's refusal to perform a lawful work order. He challenged the validity of his work order through the grievance procedures of the bargaining agreement. The issue in the grievance proceeding was whether DeSoto's work order required him to violate the law. That is also the issue on the state law claim. That issue was resolved against

DeSoto by the grievance award of the Area Committee. That award has now been affirmed as final and binding by the decision and judgment of the Court of Appeals. Thus, in terms of the liability issue, the state court claim is merely a vehicle for DeSoto to side step the final and binding effect of the grievance award.

The legal effect of Article 46 of the bargaining agreement is that an employee who challenges a discharge is treated as a covered employee denied the right to work pending the outcome of a grievance proceeding. If the attempt to discharge is sustained the employment status ends when the award sustaining the discharge is made. If the employee wins, his continuing employment status is confirmed and he is entitled to recover compensation and fringe benefits for his

work loss. The real goal of DeSoto's state law claim is to recover all damages, both actual and punitive, allowable under California tort law.

The selection of appropriate remedies is an important function of the arbitration process. United Steelworkers v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 597, 4 L.Ed. 2d 1424, 80 S.Ct. 1358 (1960). If they elect to do so the parties can designate what remedies are appropriate by agreement. United Paperworkers Union v. Misco, Inc., Supreme Court Case 86-651, decided December 1, 1987. They have done so in this case, by limiting the remedies to those of an employee wrongfully denied work, (Appendix B, pp. 23).

Even if DeSoto had won on his grievance he would not have been

entitled to the relief he asks for in his state law claim. Provision for settlement of discharge disputes through arbitration would make little sense if the remedies available under the bargaining agreement could be supplanted or supplemented by various state laws Pilot Life Insurance Co. Dedeaux 481 U.S. ____ 95 L.Ed. 2d. 39 at 53.

This is an unfair discharge dispute. As the Court of Appeals stated in its decision, this is the kind of dispute which should be the subject of a grievance procedure.

It should not be either a federal case or a state law or a state court action. The Court of Appeals has restated and applied in a proper case the views expressed by this Court in Allis-Chalmers v. Lueck 471 U.S. 202

supra. The holding of the Court of Appeals that the state law claim is pre-empted by LMRA §301 is in accord with the decisions of this Court.

C.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE ON THE PRE-EMPTION ISSUE DOES NOT CONFLICT WITH DECISION IN OTHER CIRCUITS

DeSoto cites the following cases in support of his argument that a writ of certiorari should issue in this case under Rule 17(a): Lingle v. Norge Division of Magic Chef, Inc. 823 F.2d 1031 (7th Cir. 1987); Vantine v. Elkart Brass Mfg. Co. Inc., 762 F.2d 511 (7th Cir. 1985); Johnson v. Hussmann Corp. 805 F.2d 795 (8th Cir. 1986); Baldracchi v. Pratt & Whitney Aircraft Division, United Technologies Corporation, 814 F.

2d 102 (2d Cir. 1987); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d. 120 (3d. Cir. 1986); Peabody Gallion v. Dollar 666 F.2d 1309 (10th Cir. 1981). In Lingle, Johnson and Vantine the Courts of Appeal for the Seventh and Eighth Circuits held there was LMRA §301 pre-emption. In Baldracchi, Herring, and Peabody Gallion the Courts of Appeal for the Second, Third and Tenth Circuits held against pre-emption.

There may be a conflict among those Circuits on the issue posed by the fact situations there presented. The decision of the Court of Appeals in this case poses no conflict in principle with any of those cases.

As this Court stated in Lueck, the basic question on the issue of pre-emption is whether evaluation of the tort claim is "inextricably intertwined" with

the consideration of the terms of the labor contract, Allis-Chalmers v. Lueck 471 U.S. at 213 That determination can only be made on a case by case basis.

In the Courts of Appeal cases cited by DeSoto to establish a conflict among the Circuits the employee claimed in a state law tort action that he/she had been discharged in retaliation for filing a claim under a state workmens' compensation law and that the state law prohibited such retaliation. The state case had been removed to the federal court either on the basis of a federal question or diversity. In all of the cases the posture of the case in the Court of Appeals was such that for purposes of the decision no determination was required as to whether there had or had not in fact been retaliation.

In each case there was a bargain-

ing agreement which allowed discharge only for good cause and provided for final and binding arbitration of discharge disputes. In Lingle, Vantine and Johnson the Court of Appeals involved viewed the retaliation controversy as posing a "good cause" dispute under the bargaining agreement which the parties had agreed to resolve by arbitration. In Baldracchi the Court of Appeals for the Second Curcuit took the positon that the action was one to redress interference with workmens' compensation claim rights guaranteed to the employee by state law. On that concept of the action 28 U.S.C. §1445(c) prohibiting removal of state actions arising under workman's compensation laws was viewed as an indication of congressional intent not to pre-empt under LMRA §301. Peabody Gallion was decided prior to the

decision of this Court in Lueck. It was resolved on the basis of the pre-emption guidelines under the National Labor Relations Act set forth in San Diego Building Trades Council v. Garmon 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773, (1959) Herring involved a situation in which the employer was attempting to enforce a bargaining agreement provision which imposed unlawful time limits on the duration of workmens' compensation benefits. Pre-emption was mentioned only in passing by a footnote reference to Peabody Gallion.

In this case the state law claim is clearly "inextricably intertwined" with considerations of the terms of the labor contract. DeSoto has no substantive legal right against Yellow Freight other than the right to be discharged only for "good cause" guaranteed to him

by the labor contract. By common consent discharge for refusing to violate the law would be a discharge "without just cause" under the agreement. Thus, what the state law upon which DeSoto relies here really does is to give to those who are employees at will the same "good cause" protection which DeSoto already has under the bargaining agreement.

This case illustrates why the state law claim must be pre-empted and treated as a claim under LMRA §301. The dispute which led to DeSoto's discharge was the need for a registration card on the trailer he was ordered to drive. DeSoto lost on that legal issue on grievance. There is an award sustaining his discharge which is final and binding under federal law. The only possible benefit of the state law claim to DeSoto is that

he might get damages he could not recover if he had won on his discharge grievance.

DeSoto was not discharged "for his refusal to violate state law and public policy". As the Court of Appeals stated

> "He was not acting in defense of the public policy of the state of California, but incorrectly asserting his own interpretation of the law. It is just this kind of dispute over what is the appropriate management response to difficult behavior by an employee that should be the subject of a grievance proceedure." (Petition, Appendix A, p.17a 820 F.2d. 1438).

CONCLUSION

Respondant requests that the petition of DeSoto for writ of certiorari be denied.

Respectfully submitted,

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Yellow Freight System, Inc.

APPENDIX A

APPENDIX A

California Vehicle Code §8010(a).

Notwithstanding the provisions of this chapter, the commission may establish a pilot program to enter into agreements with other jurisdictions to provide for proportionate registration and licensing that fosters the concept of the International Registration Plan of one license plate and one cab card. Foreign jurisdictions participating in the pilot program may be authorized to collect all appropriate registration and license fees that are due to the State of California, and remit such fees to this state pursuant to the terms of the agreement. The State of California may collect all appropriate registration and license fees due other jurisdictions participating in the program and for-

ward such fees as specified in the agreement. The authority to issue plates, tabs, permits or other operating inditia shall be provided for in such agreement. Source: Deering's California Codes

APPENDIX B

APPENDIX B

Reproduction of portions of Article 46 of "Western States Area Pick-Up And Delivery Local Cartage And Dock Workers Supplemental Agreement", effective April 1, 1982 to March 31, 1985.

ARTICLE 46

Section 1. Subject to the provisions of Article 8 of the National Agreement the Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Local Union affected;...

Section 2(a)... Warning letters shall be specific, not general, in nature as to alleged violation (ie.,

time, date, place, and nature of violation)...

(b) Discharge or suspension must be by proper written notice to the employee and the Union affected within ten (10) days exclusive of Saturday, Sunday and holidays of the occurence of the violation claimed by the Employer as the basis for discharge or suspension, except where dishonesty is involved... Any employee may request an investigation as to his discharge or suspension. Should such an investigation prove an injustice has been done an employee, he shall be reinstated. The Joint State Committee or the Joint Western Area Committee shall have the authority to order full, partial or no compensation for time lost.

Where an employee is suspended, or where a discharged employee is returned

to work by decision of any grievance committee or umpire, the employer shall pay the applicable Health and Welfare and Pension contributions so that there is no break in coverage.

The Joint State Committee or the Joint Western Area Committee shall have the authority in its hearing process to accept or reject any or all arguments pertaining to the issues in each case, including but not limited to timeliness, whether or not proper before the Committee, etc., and further, to order full, partial, or no compensation for time lost.

(c) At the option of an individual employer, a discharged or suspended employee who is not subject to the specific reasons for discharge set forth in Section 1 above, may be worked during the interim period pending the final

adjudication of his protest to such discharge or suspension.